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Supreme Court of the United States

Supreme Court, U. S.
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October Term, 1974

No. 74-1207

AMERICAN CHEMICAL CORP., ATLANTIC RICHFIELD CORP., ITT GENERAL CONTROLS, INC., McDONNELL DOUGLAS CORP., SHELL OIL CO., WESTINGHOUSE ELECTRIC CORP., and WITCO,

Petitioners,

vs.

THE COUNTY OF LOS ANGELES, *et al.*,

Respondents.

Petition for Writ of Certiorari to the California Court of Appeal, Second District, Division One.

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Petitioners,

vs.

THE COUNTY OF LOS ANGELES, *et al.*,

Respondents.

Petition for Writ of Certiorari to the California Court of Appeal, Second District, Division One.

Petitioners pray that a Writ of Certiorari issue to review the final decisions of the Court of Appeal of the State of California, affirming judgments of the Superior Court wherein the court refused to consider any evidence on the merits of Petitioners' claim that their property had been discriminatorily assessed in violation of the Equal Protection Clause of the United States Constitution.

Opinion Below.

The Court of Appeal rendered four opinions reported at 42 Cal. App. 3d 45, 57, 59 and 63; 116 Cal. Rptr. 751, 758, 759, and 761. These opinions are appended hereto as Appendices A1-13, B1-3, C1-3,

and D1-3, respectively. The opinions for which review is sought were filed by the Court of Appeal on September 26, 1974. Rehearing was denied on October 23, 1974.

The California Supreme Court denied hearing on December 24, 1974 without opinion.

Jurisdiction.

Petitioners claimed at all available opportunities that their property was discriminatorily assessed by Respondents at 50 percent of its market value; whereas, all other property in the County was assessed at 25 percent of market value, and that such a discriminatory assessment violated the Equal Protection Clause of the Fourteenth Amendment. The Appellate Court, by its own decision, as a practical matter, has deprived Petitioners of all existing remedies under state law, leaving Petitioners without any real opportunity to defend themselves against the illegal taking of their property by Respondents. Petitioners, thus, have been deprived of due process under the Fourteenth Amendment.

The Appellate Court opinion was filed September 26, 1974. Petition for Rehearing was denied October 23, 1974. A Petition for Hearing to the California Supreme Court was denied December 24, 1974 without opinion.

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

This Petition for Writ of Certiorari is a consolidation of the eight cases for which four opinions were written by the Court of Appeal. Since all the cases involve virtually identical questions, a single petition is being filed.

A Writ of Certiorari should be issued to review the Court orders which leave Petitioners without any effective remedy for the discriminatory assessment which they have allegedly suffered. See *Brinkerhoff-Faris Trust & Savings Co. v. Hill.**

Questions Presented.

1. Is Due Process of law as guaranteed by the Fourteenth Amendment violated where the legal redress of an aggrieved taxpayer is conditioned on the obtaining and presentation to an administrative agency of evidence under the control of the same agency, where such agency refuses to give, and by statute is barred from giving, access to such information?

2. Were Petitioners' rights to Due Process violated by being deprived of a reasonable opportunity to produce evidence on the merits of their claim at some stage in the proceedings?

3. Where a quasi-judicial agency makes no findings and the record indicates the agency applied an improper standard in arriving at its decision, does not Due Process require that the reviewing court either remand for findings or at least admit into evidence the testimony of the board members as to the standards followed?

Constitutional and Statutory Provisions Involved.

The principal constitutional provisions involved are the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

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*281 U.S. 673.

At all times pertinent, the principal sections of the California Revenue and Taxation Code involved were as follows:

§1603—"Annually, on the first Monday in July, the board of supervisors shall meet as the county board of equalization to equalize the assessment of property on the local roll. It shall continue in session for that purpose, from time to time, until the business of equalization is disposed of, but not later than the third Monday in July."

Sections 1605-1608 are set forth in Appendix E1.

§408. Non-statutory information; privacy; inspection by assessee; market data

"(a) Except as otherwise provided in subdivision (b) any information and records in the Assessor's office which are not required by law to be kept or prepared by the assessor are not public documents and shall not be open to public inspection.

(b) The assessor shall permit an assessee of property to inspect at the assessor's office any information and records, whether or not required to be kept or prepared by the assessor, relating to the appraisal and the assessment of his property, except information and records which also relate to the property or business affairs of a person other than the assessee." (Section 408 as it presently exists is set forth in full in Appendix E2-3.)

§451. Property Statements; confidential nature

"All information required by the assessor or furnished in the property statement shall be held

secret by the assessor. The statement is not a public document and is not open to inspection, except as provided in Section 408."

The pertinent sections of the California Revenue and Taxation Code providing judicial remedies after payment of tax are set forth in Appendix E as follows:

§§5103-5104 Suit for Refund after Claim rejected (Appendix E3-4);

§5136-5138 Suit for refund after protest of payment (Appendix E4-5).

Statement of Case.

§1603 Proceeding.

The County Assessor filed the Assessment Roll with the County Board of Equalization on the first Monday in July in the years involved. This was the first day of the two-week County Board of Equalization session specified in Revenue and Taxation Code §1605. This was also the first day that the Assessment Roll was opened for public inspection. No notice of assessment or tax bill was sent to Petitioners until after the period for petitioning the Board for reduction of assessment had expired.

Petitioners together with thousands of other taxpayers went to the Board Office to determine their assessments. Petitioners filed applications for reduction in assessment on the ground that their property had been assessed at 50 percent of its market value; whereas, the average ratio of assessment to market value for all taxable property in the County was 25 percent and, therefore, there was by such discriminatory assessment a denial of equal protection of the laws guaranteed by the Fourteenth Amendment.

Within an average of three days after filing the petition, Petitioners had their "hearing" before the Board. The Board consisted of three of the five members of the County Board of Supervisors. The Board of Supervisors is the combined executive, legislative and administrative head of the County, charged with the statutory duty of supervising the County Assessor in the performance of his duties.*

At the Board hearing, both the Board and the Assessor were represented by the County Counsel's Office. Approximately 10 minutes were allotted to each Petitioner for hearing.

In California, as in most states, assessments are made at a fraction of market value. Fractional assessments are valid if uniformly applied. The Assessment Roll revealed only the assessment—it did not indicate the fraction of assessment used by the assessor on any property.

There were over three million assessments on the Assessment Roll. Hence, if a taxpayer challenged the assessed valuation of his property it was his burden to determine and prove the cumulative market value of over 3,000,000 items on the Assessment Roll. Without the total of the market values of items on the Roll, the average rate of assessed value to market value could not be established. Whether a discriminatory rate of assessment was applied to a Petitioner's property could only be determined after establishment of the average rate of assessed to market value for all properties in the County.

Obviously, within the two-week period provided, Petitioners could not have independently valued all the

*Calif. Gov. Code §25303.

properties on the Roll in order to prove the average rate of assessment for the county. And, no local determination was available since neither the Assessor nor the Board of Supervisors made any attempt to determine, in the performance of their assessment duties, the average rate of assessment for the County.

The only official determination of the assessment ratio for the county was that determined by the State Board of Equalization. This State Board determination was based on statistically reliable sampling techniques. Petitioners offered as evidence in support of their contention the official determination of the State Board of Equalization for the prior year which showed an approximate county-wide ratio of 25 percent. However, this evidence was excluded by the Board as irrelevant.

Petitioners then offered the tentative ratio determination of the State Board for the year in issue; it was also excluded by the Board. The Superior Court found the official ratio of the State Board to be 24.6%.

Four of the Petitioners requested that the matters be held under submission for a few weeks until the official State Board ratio determination for the current year could be made available to the Board. The Board denied this request.

In three of the cases, the only evidence of the average rate of assessment before the Board was that offered by Petitioners. In five of the cases, the County Assessor asserted without any evidentiary support that all of the property in the County was being assessed at 50 percent of the "Assessor's opinion of market value". As a practical matter, Petitioners were denied any effective means by cross-examination or otherwise of controverting the Assessor's assertion. Under Revenue and Taxa-

tion Code §§408 and 451 all market data pertaining to "the Assessor's opinion of market value" of the property on the Tax Roll was made secret and unavailable to the Petitioners. The Petitioners were also barred from discovery proceedings prior to the "hearing" on their petition.*

The Board took the petitions under submission and subsequently denied them. There was no opinion or findings and no procedure for requesting findings. The Superior Court found that neither findings nor written reasons for decision were required by due process to review of the Board's determination.

§§5103-5104 and §§5136-5139 Proceedings.

The Petitioners paid their taxes. Five paid under protest pursuant to an apparent statutory remedy which permits a suit for refund of taxes paid under protest on the grounds of recovery set forth in the protest.** Three of the Petitioners filed claims for refund which were rejected; they then sued under the statutory provisions permitting suits for refund on the grounds of recovery set forth in the claims.***

The protests and claims for refund generally alleged that the discriminatory assessments constituted a denial of equal protection of the laws. Petitioners also set out in their protests and claims for refund that the Board abused its discretion in denying the petitions for reduction in assessment. In three of the claims for refund and in one of the protests of payments, Petitioners alleged a denial of due process in that (a) the Assessor

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*_Hunt-Wesson Foods, Inc. v. County of Stanislaus_, 273 Cal. App. 2d 92, 77 Cal. Rptr. 832.

**Rev. & Tax. Code §5138.

***Rev. & Tax. Code §5103.

testified falsely at the Board hearings that all property in the county was assessed at 50 percent of Assessor's opinion of market value, (b) the Board members knew that this testimony was false, and (c) the Board members knew that the average rate of assessment was 25 percent but participated in the fraud in affirming the 50 percent rate of assessment on Petitioners' property. All of the protests and claims alleged that the Board acted erroneously, capriciously or abused its discretion in affirming a 50 percent rate of assessment on Petitioners' property when the Board members knew the average rate of assessment on all taxable property was 25 percent.

The complaints for refund generally set forth the same grounds for recovery as the protests. Respondents' answers, besides general denials, alleged as an affirmative defense, citing case law, that Petitioners were not entitled to pursue their actions for refund on the merits and that the sole function of the Trial Court was to review the records before the Board of Equalization for substantial evidence to support the Board's denial.

The Westinghouse and Shell cases were consolidated for trial before Superior Court Judge Fargo. The six other cases, American Chemical, Atlantic Richfield, Witco, McDonnell Douglas (two cases) and ITT General Controls were subsequently consolidated for trial before Superior Court Judge Rhone.

Both Courts refused to consider any evidence on the merits.

Offers of proof were properly made. They included the testimony of Assessor Watson that he became Assessor after the Board hearings terminated: that in the performance of his subsequent official duties he de-

termined that the average rate of assessment for the year involved was 25 percent; and that since the County itself made no determination of assessment ratio, the County adopted the State Board ratio of 25 percent as the official county ratio, all tending to show that the average rate of assessment was approximately 25 percent. Also offered were the admissions of the members of the Board of Supervisors (who were unavailable at the time of the Board hearings, since they were sitting as members of the Board of Equalization) that the average rate of assessment was, in fact, 25 percent, and that they knew this at the time they affirmed the 50 percent rate of assessment on Petitioners' property but that they thought they were free to apply any ratio between zero and 50 percent.

Both Superior Courts refused Petitioners' request that the cases be remanded to the Board of Equalization for a finding on the ratio applied by the Board.

Both Courts refused to admit the testimony of the members of the Board for the limited purpose of determining whether they applied a legal standard in "equalizing" Petitioners' assessments on the Assessment Roll.

HOW FEDERAL QUESTIONS WERE RAISED BELOW.

I.

The Appellate Court Decision Renders the §1603 Procedure Fatally Defective as a Remedy by Requiring Petitioners to Prove the "Aggregate Market Value" of All Property on the Roll as Determined by the Assessor.

The Appellate Court decided that Petitioners

> "bore the burden of proof of establishing an improper assessment before the board. [Citations] To sustain that burden, they offered only evidence that the State Board of Equalization's determination of county-wide ratio of assessed to market value was 25 percent while their properties had been assessed at 50 percent of full cash value. Appellants did not offer evidence that the state board ratio was computed using the same aggregate fair market value of all taxable property in the county as was used by the assessor. Absent that showing, the state board's ratio was inadmissible. (Glidden Company v. County of Alameda, supra, 5 Cal. App.3d 371, 380-381.) Thus appellants failed, as a matter of law, to sustain their burden of proof, compelling a conclusion that their properties were correctly assessed."*

In Petitioners' Petition for Rehearing it was pointed out that the Appellate Court decision destroyed any remedy since it was impossible to prove the "aggregate market value as used by the Assessor". The Petition for Rehearing was denied.

In the Petition for Hearing by the California Supreme Court, Petitioners arged that the Appellate

*D2-3.

Court decision destroys the administrative remedy since the "aggregate fair market value of all taxable property" used by the Assessor was not available to the taxpayer. In a §1603 proceeding a taxpayer is denied by Sections 408 and 451 access to all market data used by the Assessor. Also, taxpayers are denied any discovery in an equalization proceeding. *Hunt-Wesson Foods, Inc. v. County of Stanislaus.** Petitioners argued that they were denied due process by being denied an effective remedy at any stage of the proceeding. Hearing was denied by the California Supreme Court without opinion.

The Appellate Court cites *Glidden v. Alameda County*** as controlling authority. That decision was filed just after the Westinghouse-Shell trial before Judge Fargo and just before the other six cases were considered by Judge Rhone.

Apparently the Appellate Court did not consider the adequacy of remedy-due process question in light of the *Glidden* decision on the theory that it was not pleaded.

However, the *Glidden* decision came as a complete surprise since all the prior statutory and decisional law indicated that both the Assessor and the State Board of Equalization were required to follow the same objective standards in arriving at total full-cash value or aggregate fair-market value.*** Although the Appellate Court compared "full-cash value" as determined by the State Board with "aggregate fair-market value" as deter-

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*273 Cal. App. 2d 92, 77 Cal. Rptr. 832.

**5 Cal. App. 3d 370, 85 Cal. Rptr. 88.

***Rev. & Tax. Code §401 requires Assessor to base assessments on "full-cash value"; §1815 requires County Board to determine the total "full-cash value" of all property assessed by the County Assessor.

mined by the Assessor, the California Supreme Court previously ruled that full-cash value and fair-market value are synonymous.* That decision was codified after the *Glidden* case but before the instant decision by the Appellate Court.**

Petitioners notified Judge Fargo immediately of the *Glidden* decision after it was filed, and argued that it negated the §1603 procedure as a remedy, depriving them of due process.

The argument that the application of the *Glidden* decision denied Petitioners a remedy under §1603 and thus denied them due process was set forth in Petitioners' pre-trial memorandum and argued verbally before Judge Rhone. In addition, the testimony of the new Assessor and the Chief of the Real Property Division for the Assessor's Office was offered to show that since the County Assessor failed to determine market value for most of the property on the Assessment Roll, that the requirements of the *Glidden* case could not and did not apply. The offer was refused by the Trial Court, with the refusal being affirmed by the Appellate Court.

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*_DeLuz Homes, Inc. v. County of San Diego_, 45 Cal. 2d 546, 290 P. 2d 544.

**Rev. & Tax. Code §110

" 'Full cash value' or, 'market value' or, 'value' means the amount of cash or its equivalent which property would bring if exposed for sale in the open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other and both with knowledge of all of the uses and purposes to which the property is adapted and for which it is capable of being used and of the enforceable restrictions upon those uses and purposes."

II.

The Appellate Court Held That Petitioners Were Not Entitled to Produce Any Evidence on the Merits in the Proceedings Under §§5103-5104 and §§5136-5139.

Petitioners argued before the Superior Court that they were entitled to introduce evidence on the merits since they had no real opportunity to do so in the §1603 proceeding. The Superior Court in all cases refused to consider any evidence on the merits of the claim that Petitioners were discriminatorily assessed and denied equal protection of the laws.

The Appellate Court's decision is as follows:

> "Compelling precedent holds that judicial review of the determination of assessed value made by the county board of equalization tests the existence of substantial evidence to support the board's conclusion and that the taxpayer seeking review is not entitled to a trial de novo before the reviewing court [citing cases]."*

The Petition for Rehearing on this issue was denied and Petition for Hearing in the California Supreme Court on this point was also denied.

III.

Due Process Was Denied by Exclusion of Testimony of Members of the Board Which Was Offered for the Limited Purpose of Determining Whether They Followed a Constitutional Standard in "Equalizing" Petitioners' Property Assessment.

The Superior Court refused to consider the testimony of members of the Board for even this limited purpose.

The Appellate Court found in three cases that

> "Here the record of proceedings before the Board of Equalization indicates that at least two

*A5.

of its members applied an improper basis of decision. Appellants, however, were not prejudiced by that action. They bore the burden of proof of establishing an improper assessment before the Board."*

How can it be said there is no prejudice? The testimony of the Board members, who were also the top executive and assessing officials of the County, was offered, excluded, and thereby presumed true that they knew the average rate of assessment was 25 percent at the time they affirmed the 50 percent rate of assessment on Petitioners' property.

The Appellate Court also decided that the principles of this Court's decision in *Citizens to Preserve Overton Park v. Volpe*** were inapplicable and that the testimony of members of the Board were not admissible to show the "standard of decision utilized", even though there were no findings of fact.***

The same due process argument was made in the Petitions for Hearing to the California Supreme Court.

IV.

Alternatively, Due Process Was Denied by the Court's Failure to Remand the Case to the Board for a Finding as to the Rate of Assessment Applied to Petitioners.

This issue was squarely before the Superior Court and argued extensively, both in the pre-trial briefs and orally. The Superior Court specifically found that there were no findings and that no findings were required for review of an administrative decision.

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*D2, C3.
**401 U.S. 402.
***A8-9.

The Appellate Court ruled that lack of findings was not an issue since it was not raised as a ground for refund of taxes erroneously collected. We submit that findings pertain only to the fundamental fairness of the hearing and the ability to have judicial review.

The Appellate Court *refused* to consider the effect of §5137 in conjunction with §5139. Section 5137 makes it clear that the protest set forth only the grounds on which it is claimed that the assessment or the payment of it is void, *i.e.* the discriminatory assessment.

Furthermore, in three of the cases a procedure (claim for refund) entirely different than that ruled on by the Appellate Court (protest of payment) was used. The statutory grounds for refund set forth in the claims procedure is as follows:

> "[N]o recovery of taxes shall be allowed in any such action upon a ground not asserted in the claim for refund."*

The failure of the Appellate Court to consider §5137 in conjunction with §5139, or to construe §5104 at all, was called to its attention in the Petition for Rehearing and in the Petition for Hearing by the Supreme Court, which were both denied.

The Appellate Court cites no authority for its opinion and is contrary to all other cases which have applied rules of liberal construction to these sections.**

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*Rev. & Tax. Code §5104.

***Georgia Pacific Corp. v. County of Butte*, 37 Cal. App. 3d 461; *Pacific Coast Co. v. Wells*, 134 Cal. 471, 474; *Brenner v. Los Angeles*, 160 Cal. 72, 78; *Signal Oil Co. v. Bradbury*, 138 Cal. App. 2d 40 at 45-46, in reversing the Trial Court explained:

> "By enacting Sections 5096 through 5107, the Legislature established in the Revenue and Taxation Code an entire procedure for the consideration of tax refund claims by the board of supervisors, complete in itself and separate and independent of any other statutory procedure."

The judicial remedy as provided by §§5103-5104 and 5136-5139 is not conditioned by their terms nor even mention the prepayment administrative remedy under §1603.

When state rules are applied as a pretense to avoid a federal question or in a manner that discriminates against assertion of federal claims, the Supreme Court will ignore or override the state procedural requirements.*

V.

Petitioners Were Denied Due Process in Not Being Permitted to Proceed on the Fraud Issue as Pleaded.

In the *American Chemical* decision, the Appellate Court notes the fraud argument and rules as follows:

> "Taxpayers alternatively seek to avoid the impact of the general principle barring the evidence offered by them at trial by arguing that much of the barred testimony was relevant to establish fraud on the part of the assessor and Board in making the questioned assessment and in administratively reviewing it. The argument is not available on the record here. Assuming the relevancy of the proffered testimony to the issue asserted, the evidence is not relevant to the case at bench because the issue of fraud was not raised in the complaint."**

The Court is correct that fraud was not specifically pleaded in those three cases.

However, fraud was specifically pleaded in the claims, protests and complaints in the five other cases.

**Nikel v. Cole*, 256 U.S. 222, 225; Stern & Gressman, Supreme Court Practice, pp. 123, 133 (4th ed., 1969).

**A12.

Petitioners in five cases pleaded that the Assessor falsely testified before the Board that all property was assessed at 50 percent of "Assessor's opinion of market value"; that the Board members knew that this was false; and that they knew that the average rate of assessment was 25 percent when they affirmed the 50 percent rate of assessment applied to Petitioners' property.

The Appellate Court simply incorporated the *American Chemical* decision by reference in its three other decisions without considering the fraud issue as pleaded in those other cases. This error was brought to the Appellate Court's attention in the Petitions for Rehearing which were denied and the Petitions for Hearing before the California Supreme Court which were likewise denied.

Petitioners made appropriate offers of proof, including the testimony of the Board members that they knew the rate of assessment was 25 percent when they affirmed the 50 percent ratio. This testimony was not admitted at the Superior Court level on the theory the Court was only permitted to review the record of the Board proceeding itself.

REASONS FOR GRANTING WRIT.

I.

The Appellate Court by Its Decision Has Deprived Petitioners of Any Viable Administrative Remedy—Except "Self Equalization".

Conditioning relief in a §1603 Board proceeding on proving the aggregate market value as used by the Assessor destroys the remedy. The taxpayer is prohibited by the secrecy statutes, §§408 and 451, from producing what he is required to produce.

The Appellate Court's holding that the State Board of Equalization's determination of county-wide ratio is inadmissible is misleading. If we had the aggregate market value as used by the Assessor, we would not need the State Board ratio determination.

The aggregate market value is the missing denominator in the assessment fraction. The numerator is the total assessed value of all the assessment items on the Assessment Roll. The latter can be readily obtained by simply adding up the three million separate assessments on the Roll.

On the other hand, even the Respondents concede that it would be impossible to independently determine the market value of all the items on the Roll by appraisals as the Assessor is supposed to do.

The Appellate Court also makes an invalid assumption that there is an aggregate market value used by the Assessor. Testimony of assessing officials was offered at one trial and introduced in the other showing that the Assessor did not attempt to make any determination of market value for improvements—over half the assessed value on the Roll. It was inequitable for

the Appellate Court to uphold the exclusion of this evidence which would show the inapplicability of the *Glidden* rule.

The rule of the Appellate Court that defects in the administrative review must be pleaded as a ground of recovery could not be complied with since the *Glidden* decision was not decided until after trial in one case and until after time to plead had expired in the other case.

Another preposterous aspect of the Appellate Court decision is that it presumes each taxpayer in a §1603 proceeding has the duty to prove the county-wide ratio. As Respondents noted recently in one of their briefs, there were some 10,000 separate hearings in Los Angeles County alone in one year. Imagine requiring appraisal testimony on even a fair sampling of the three million properties on the Assessment Roll in the 10 minutes allotted for each hearing. Ridiculous! That is why the California Legislature provided for an independent determination of the average rate of assessment for the County so that everyone appearing before the Board would have a means of comparing the fairness of the rate of assessment applied to his own property.

The Appellate Court holds the State Board determination inadmissible.

Consequently, Petitioners are left with no viable administrative remedy.

Lack of any viable remedy has led to serious degeneration of the self-reporting system so essential to

American tax laws. For example, for the tax years here in issue, many taxpayers—though not Appellants—felt that since they had no viable remedy to over-assessment, the only alternative was to under-report their property for property tax purposes. This has been classified as "self-equalization" by Phillip E. Watson, current Assessor for Los Angeles County, who testified in his own grand jury proceedings that hundreds of millions of dollars worth of taxable property in Los Angeles County alone was under-reported by taxpayers seeking to defend themselves against the illegal practices of the former County Assessor.* He further testified that proceedings to recover hundreds of millions of dollars in deficiency assessments were dropped against these under-reporting taxpayers.

Watson explained that those taxpayers had self-equalized the discriminatory 50 percent assessment on their property and, as a result, they paid about as much tax as would have been due had their property been fairly assessed.

On the other hand there are taxpayers like Appellants who reported fully, were illegally assessed and now are denied any recourse.

What course of conduct can be expected of taxpayers and public officials in the future if this gross injustice is allowed to stand?

**People of State of California v. Phillip E. Watson, et al.*, Los Angeles Superior Court Crim. No. 337 865, Grand Jury Proceedings, Reporter's Transcript, Vol. 3, pp. 753-60.

II.

The Appellate Court Decision Leaves Millions of Property Taxpayers With No Viable Remedy, and Will Lead to Further Corruptness on the Part of Public Officials.

The California Legislative Committee on Revenue and Taxation in its final report on the problems of property tax administration in California, reported in December of 1966 as follows:

> "At this writing, the former Assessors of San Francisco and Alameda Counties, Russell Wolden and Donald Feragen, have been convicted of bribery. In San Diego, former Chief Deputy Assessor John Cox McQuilken committed suicide after the scandals broke. In several other counties, investigations are still in progress. Where there has been no criminal wrongdoing, there have been serious disparities in assessment, but this is not to imply that assessment administration has been slipshod in all counties. It has not. Some assessors have done yeoman work under trying conditions."*

The State Attorney General states in the report that though assessments may be made at a fraction of market value, the fractions must be uniform for all property in the County under the California Constitution.

The Assembly Committee continues:

> "Considering the clear intent of the law, how could a system of corruption and favoritism take root and flourish?

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*Calif. Assembly, Assembly Interim Committee on Revenue and Taxation, Final Report, Vol. 4, No. 20, p. 8 (Dec. 1966).

> In the three counties where the assessor or chief deputy has been convicted, a rather ingenious system of fraud was devised. The assessors set themselves above the law and placed higher assessments on business properties than on other classes of property in the county. This in itself is clearly a violation of state law. Virtually without legal remedies to protect themselves, some businesses then found that their assessment could be lowered to where it should have been in the first instance (and in some cases, much below) by use of the service of a tax consultant."*

Since the report, top assessment officials in every principal county in the State of California have been indicted and many convicted. It is still going on. Indictments were just handed down against assessment officials in Orange County.

The corruptness of public assessing officials will continue so long as the taxpayers do not have a viable remedy for the illegal taxation of their property. You can rest assured that this lack of a viable remedy has created wholesale disrespect for the judicial system which is supposed to protect citizens against infringement of their Constitutional rights by governmental action.

Under present law as amended since the years here in issue, the Assessor is not permitted to assess a specific property in excess of 25 percent of its market value.** However, the decision in this case effectively wipes out any safeguard against the Assessor assessing

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**Id.*, at pp. 8-9.

***Rev. & Tax. Code §1605.

the property of any pressure or favored group at a rate lower than 25 percent of the actual county-wide rate to the detriment of those assessed at the standard rate. The same basis for assessment rate discrimination still exists in California as existed in *Sioux City Bridge Co. v. Dakota County** where this Court struck down an assessment at 100 percent of market value as compared to an average rate of 50 percent for all taxable property in the county, in *Brinkerhoff-Faris Co. v. Hill***—100 percent as compared to a 75 percent average, and the present case in which Petitioners were assessed at 50 percent compared to an average rate of 25 percent for the County. The taxpayer who may be discriminated against in the future is still without a remedy.

The Appellate Court decision also destroys the safeguards enacted by the California State Legislature in California Revenue and Taxation Code §1605 (b) and (c).

Section 1605 (b) provides that an assessment may not exceed

> "(b) An amount equal to the property's full cash value, as determined by the county board, multiplied by 115 percent of the [State] board's preliminary or final ratio for the county."

The Appellate Court destroys this safeguard by holding that the official State Board ratio determination for a county is inadmissible in a County Board proceeding.***

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*260 U.S. 441.
**281 U.S. 673.
***B3.

Section 1605 (c) provides that an assessment may not exceed

> "(c) An amount equal to the property's full cash value, as determined by the county board, multiplied by the ratio of assessed to full cash value for all property in the county, established without reference to the board's ratio for the county."

Section 1605 (c), as a safeguard against arbitrary assessment, is destroyed by the Appellate Court's decision that no ratio is admissible without the impossible proof that it was based on the *same* aggregate market value of all taxable property in the county *as was used by the Assessor.*

III.

The Decision of the Appellate Court Is in Conflict With This Court's Decision in Brinkerhoff-Faris Co. v. Hill Since the Court Itself Changed the Rules to Deprive Petitioners of Any Remedy.

The conditions for equalization in a §1603 proceeding were drastically changed by the Appellate Court and the *Glidden* decision. Assuming by some immense stretch of the imagination that Petitioners could prove the nonexistent aggregate market value used by the Assessor, they still have been deprived of property without being afforded a fair opportunity to be heard in its defense. *Brinkerhoff-Faris Co. v. Hill.**

In *Brinkerhoff,* identical allegations on the merits were made. There it was alleged that a discriminatory assessment of petitioners' property had been made in

*281 U.S. 673.

comparison with the rate of assessment applied to other property. It was also asserted there that the discriminatory portion of the assessment was void as violative of the Equal Protection Clause of the Fourteenth Amendment. As in these cases, the Trial Court refused to consider any evidence on the merits.

In *Brinkerhoff*, the Missouri Supreme Court denied relief on the ground that the petitioners there could have sought relief from the State Tax Commission but were now barred from doing so by laches. The petitioners had not gone to the State Tax Commission because previously the Missouri Supreme Court had held that the Commission lacked jurisdiction to grant relief from alleged discriminatory assessments.

Again, this parallels the instant cases in which Petitioners offered in the §1603 proceeding the official State Board determinations of county-wide assessment ratio. At that time they were the only determinations of the county-wide ratio sanctioned by law. Now, the California Appellate Court holds that, in effect, the statutory provisions requiring both the Assessor and State Board to determine fair-market value by statutory standards no longer apply; therefore the State Board ratio is inadmissible. The Appellate Court now, long after all rights to a §1603 proceeding expired, conditions administrative relief upon the Petitioners showing a nonexistent aggregate market value of all the assessable properties as used by the Assessor. Petitioners have not been afforded any opportunity to comply with this new requirement.

In remanding the *Brinkerhoff* case for trial on the merits, this Court stated:

> "It is plain that the practical effect of the judgment of the Missouri Court is to deprive the

plaintiff of property without affording it at any time an opportunity to be heard in its defense. The plaintiff asserted an invasion of its substantive right under the Federal Constitution to equality of treatment."*

This Court went on to say:

"Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded him some real opportunity to protect it."**

Petitioners in the present cases have had no clear opportunity to defend themselves against the illegal assessment. The Appellate Court has required them to do something they are prohibited to do by §§408 and 451, the secrecy statutes.

IV.

The Decision of the Court of Appeal Conflicts in Principle With Decisions of This Court and Other Federal Courts That a Person Is Not Limited to an Inadequate Administrative Remedy When There Is a Denial of a Fourteenth Amendment Right.

As we have seen, the Appellate Court's conditioning relief on proving the aggregate market value as used by the Assessor destroyed the administrative remedy under §1603. The taxpayer cannot produce what he is required to produce by reason of §§408 and 451, the secrecy statutes. Furthermore, the Assessor neither determined nor used an "aggregate market value".

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*281 U.S. at 678, citing *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, and *Greene v. Louisville & Interurban R.R. Co.*, 244 U.S. 499.

**281 U.S. at 682.

Even though there was no viable administrative remedy, Petitioners were deprived of the right of introducing any evidence on the merits in the Superior Court.

Every step of the way, the Petitioners have been denied the opportunity of producing any evidence.

The decision of the Court of Appeal conflicts in principle with decisions of this Court and Circuit Courts of Appeal, holding that a person is not limited to an inadequate or useless administrative remedy, particularly where there is denial of a Fourteenth Amendment right. *McNeese v. Board of Education for Com. Unit. School District*, 373 U.S. 668; *City Bank Farmer's Trust Co. v. Schnader*, 291 U.S. 24 (holding that the taxpayer had been denied equal protection of the laws in a tax assessment); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (holding that a discriminatory assessment in excess of the county-wide average rate of assessment denied equal protection of the laws).

As held in *Marsh v. County School Board of Roanoke, Virginia*, Fourth Circuit (1962), an individual is not limited to administrative remedies

> "if they are inherently inadequate or are applied in such a manner as in effect to deny the petitioners their rights."*

One of Respondents' principal arguments is that Petitioners are large corporations and, therefore, their civil rights do not merit judicial protection. If taxpayers with theoretical unlimited resources cannot achieve any relief at any stage of the proceedings, where does that leave the average taxpayer?

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*305 F. 2d 94, 98.

To date we know of no reported case in California where a taxpayer achieved relief from an assessment discriminatory in comparison with the average rate of assessment for all taxable property in the county, except to the extent that a discriminatory rate of assessment was admitted by the County Assessor.

V.

The Judicial Review Afforded Petitioners Failed to Comply With Minimum Standards of Due Process and Conflicts in Principle With Recent Decisions of This Court.

Assuming for the moment it may have been proper to exclude evidence on the merits every step of the way, Petitioners were still entitled to judicial review of the administrative decision.

It is submitted that judicial review of an administrative proceeding is meaningless unless the reviewing Court has some basis for determining whether the agency followed the standards described by law in arriving at its decision. At a very minimum, there should be findings of fact on the ultimate issues, some written reason for the decision, or testimony or statements by the Board members for the limited purpose of determining the standard they followed.

None of these were available to the Court to review the one-word Board decision "denied". All were requested. All were denied.

The Appellate Court decision conflicts, at least in principle, with recent decisions of this Court which outline the minimum requirements of due process. See, for example, *Goldberg v. Kelly** and *Jenkins v. Mc-*

*397 U.S. 254.

*Keithen.** This Court in these and other cases has established that due process requires that when an administrative body makes a quasi-judicial decision affecting Fourteenth Amendment rights, some written reason for the decision must be given by the agency.

In *Wolf v. McDonnell,*** which involved a prison disciplinary proceeding, this Court held that "minimum due process" requires the prison disciplinary board to give some written reasons or basis for their decision. It is respectfully submitted that Petitioners herein are entitled to *at least* as much protection at administrative hearings concerning the taking of their property by taxation as prisoners have in prison disciplinary hearings. Not only is the right to property less conditional than the right to remain "free" in prison, but, unlike the disciplined prisoners, Petitioners herein are statutorily entitled to a judicial review for which findings of fact or written reasons for decision are essential.

The Appellate Court notes as follows:

> "In 1971, the United States Supreme Court enunciated a significant exception to the *Morgan* Rule, holding that where the administrative agency did not make findings of fact or otherwise articulate a basis of its decision, the reviewing court could, in its discretion, require testimony from the administrative decision maker explaining the standard of decision used or alternatively remand the matter to the agency for findings of fact. (*Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 420 [28 L.Ed. 2d 136, 91 S.Ct. 814];

*395 U.S. 41.

**....U.S....., 94 S. Ct. 2969.

see also *Camp v. Pitts*, 411 U.S. 138, 142-143 [36 L.Ed.2d 106, 93 S.Ct. 1241]; see: *Recent Developments, Administrative Law and Procedure*, 60 Georgetown Law J. 1101, 1111; *The Supreme Court*, 1970 Term, 85 Harv. L. Rev. 3, 321; Note, *Environmental Law and the Scope of Judicial Review*, 24 Stan.L.Rev. 1117, 1118, fn.8)."*

However, the Appellate Court refused to apply the *Overton Park* case to permit the introduction of the Board members' testimony for the limited purpose of determining whether it followed a proper standard. The offered testimony, of course, would show that the Board was, in fact, using a flexible standard from zero to 50 percent in direct violation of Petitioners' right to Equal Protection guaranteed by the Fourteenth Amendment.

The Appellate Court found that the short transcript of the Board proceedings in three of the cases, itself, indicated that the Board was following an illegal method of equalization but then held that Petitioners were not prejudiced by the Board's use of an illegal means of equalization!

Lack of prejudice is utter speculation on the Court's part. The testimony of the Board members was that they knew the average rate of assessment was 25 percent when they affirmed the 50 percent rate on Petitioners' property. Presumptively, the Board would apply the proper rate of assessment to Petitioners' property if the Court simply instructed the Board that they were required to apply the same rate of assessment to all taxable properties.

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*A8.

The Appellate Court completely overlooks the fact that this was no impartial or disinterested Board. These were the top assessing officials of the County who were reviewing the assessments of their subordinate, the County Assessor. They were charged by statute with the duty of supervising this Assessor. Both the Board and the Assessor were advised by the same counsel.

Under the circumstances, the reviewing Court should make some inquiry to determine whether Petitioners have been afforded a fair hearing in compliance with due process.

The case should be remanded for a finding on the average rate of assessment for all taxable property in the County. This is exactly what this Court did in *Sioux City Bridge Co. v. Dakota County.**

Conclusion.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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*281 U.S. 678.

APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division One.

American Chemical Corporation, a corporation, Plaintiff and Appellant, v. County of Los Angeles, Defendant and Respondent. Civil No. 38868, (Sup. Ct.No. 814295).

Witco (formerly Whitfield Chemical Corporation), a corporation, Plaintiff and Appellant, v. County of Los Angeles and City of Los Angeles, Defendants and Respondents. Civil No. 38871, (Sup.Ct.No. 814294).

Atlantic Richfield Corporation (formerly Richfield Oil Corporation), a corporation, Plaintiff and Appellant, v. County of Los Angeles, City of Los Angeles, City of Baldwin Park, City of Glendale, City of Hawthorne, City of Pomona, City of Santa Fe Springs, City of South Gate, and City of Torrance, Defendants and Respondents. Civil No. 38872, (Sup.Ct.No. 814264).

Filed: Sept. 26, 1974.

APPEALS from judgments of the Superior Court of Los Angeles County. Bayard Rhone, Judge. Affirmed.

Poindexter & Doutré, William M. Poindexter, John B. Marshall, William H. Powell, and James D. Kowal, for Plaintiffs and Appellants.

John D. Maharg and John H. Larson, County Counsel, Douglas V. Hart and Dixon M. Holston, Deputy County Counsel, for Defendants and Respondents.

In these three consolidated appeals from judgments of the superior court denying recovery of ad valorem

taxes paid by appellants (Taxpayers) upon their business personal property, Taxpayers contend that the procedure for assessment of tax denied them an adequate administrative remedy and that the administrative process and procedures of judicial review denied them equal protection of the law. Identical contentions were resolved by us against the appellants in companion cases, *Westinghouse Electric Company v. County of Los Angeles,* etc., 2d Civil No. 37809, ... Cal. App.3d ..... [..... Cal.Rptr. .....] certified for publication, filed concurrently with this opinion. The reasons stated in *Westinghouse* require rejection of the contentions of Taxpayers in the case at bench. Taxpayers also contend: (1) the trial court improperly applied "the substantial evidence test" in reviewing the determination of respondent Los Angeles County Board of Supervisors sitting as a Board of Equalization (Board) rather than conducting a trial de novo; (2) the trial court erroneously denied them a requested finding of fact upon the ratio of assessed to market value used generally in assessing property in the county; (3) failing to make that finding, the court should have remanded the matter to the Board with directions to make it; (4) the trial court erroneously excluded evidence of county-wide assessment ratio as determined by the State Board of Equalization; (5) the trial court improperly excluded evidence offered by Taxpayers to show a discriminatory practice had been employed in assessing their personal property, to establish that their administrative remedy was inadequate and futile, to show fraud of the assessor and the Board, to establish that the Board applied an improper standard of decision, and to establish that a failure of equalization estopped respondent from asserting that Taxpayers pre-

sent their claims at an administrative hearing; (6) the trial court erroneously barred evidence that Taxpayers could not with reasonable diligence have produced at the administrative hearing; and (7) the court improperly thrust upon Taxpayers the burden of proof before Board of the county-wide assessment ratio as part of their case to establish that their individual assessments were excessive.

Bound by controlling precedent, we conclude that on the record of the cases at bench Taxpayers' contentions are not sustained. Accordingly, we affirm the judgments.

Taxpayers are three related corporations. They each filed a separate timely application with Board seeking reduction of the assessed value of their respective business personal property as of March 1, 1962. On motion, the three applications were consolidated for hearing. Evidence was produced before Board to the effect that the business personal property of Taxpayers was assessed at 50 percent of the assessor's opinion of full cash value in the same manner as property of similar businesses and "all other property in the county." Taxpayers produced evidence showing county-wide assessments in the years 1950 through 1961 to establish a trend of total assessed value of property in the county and indicating relatively minor changes from year to year. Their motion to incorporate evidence from another hearing before the Board indicating that the State Board of Equalization had determined an assessment ratio of 25 percent for the year 1961 was granted. Evidence offered by Taxpayers to establish that the State Board of Equalization had concluded that the Los Angeles County ratio of assessment in 1961 was 25 percent and that the tentative ratio for 1962 was

a similar percentage was barred on objection of the County Counsel. Board denied Taxpayers' applications for reduction of assessment.

Each of Taxpayers paid the taxes assessed against it. The payments were accompanied by written protests identical in wording except as to name and amount. The protests state: "The grounds on which the claim of [Taxpayer] is found are as follows" and then recite that Taxpayer's personal property has been assessed at 50 percent of its full cash value while other property in the county was assessed at no more than 25 percent of its full cash value.

On February 26, 1963, each Taxpayer filed a one count complaint for "refund of taxes paid under protest," thus commencing the cases at bench. The complaints allege essentially the same basis of overpayment stated in the protest. After a trial on the issues raised in the complaints, the court held against Taxpayers. This appeal followed.

Requirement of Protest-Pleadings

Where, as here, a suit is for refund of ad valorem taxes paid under protest, Revenue and Taxation Code section 5139 states: "the action may be brought only . . . (b) [o]n the grounds specified in the protest." Taxpayers' protests failed to specify or intimate that the taxes, which are the subject matter of the actions were improperly assessed because Board failed to make findings of fact,[1] because Board improperly excluded proffered evidence, or because the process of assessment denied them adequate administrative review. Any

[1]The issue not having been raised in the protest or complaint, we do not consider the applicability of *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506 [113 Cal.Rptr. 836, 522 P.2d 12] to the case at bench.

action in the trial court, and hence any appeal on those grounds, is barred by Revenue and Taxation Code section 5139, subdivision (b). The issues not having been raised in the complaint, they were not properly before the trial court for that reason also.

Substantial Evidence Test - Refusal of Finding on County-wide Assessment Ratio

Taxpayers' contentions of error by the trial court in applying the substantial evidence test to review of Board's determination and in failing to make findings of fact on issues that were before the Board are related. If the substantial evidence test applies, the superior court, in reviewing the determination of the administrative agency, decided a question of law and was not required to make findings of fact on issues determined by the agency. (*Bank of America v. Mundo*, 37 Cal.2d 1, 5 [229 P.2d 345]; Deering, California Administrative Mandamus (Cont.Ed.Bar), § 14.3, and cases there cited.)

Compelling precedent holds that judicial review of the determination of assessed value made by a County Board of Equalization tests the existence of substantial evidence to support the board's conclusion and that the taxpayer seeking review is not entitled to a trial de novo before the reviewing court. (*Bank of America v. Mundo, supra*, 37 Cal.2d 1, 5; *De Luz Homes, Inc. v. County of San Diego*, 45 Cal.2d 546, 564 [290 P.2d 544]; *Strumsky v. San Diego County Employees Retirement Assn.*, 11 Cal.3d 28, 34-36 [112 Cal.Rptr. 805, 520 P.2d 29].) Taxpayers argue that the precedent is not controlling because the cases declaring the rule fail to recognize article XIII, section 15 of the California Constitution which Taxpayers contend cre-

ates a judicial remedy of refund of ad valorem taxes erroneously assessed, independent of any administrative action to accomplish the same result. They support their argument by tracing the controlling case law into seminal decisions argued to be either wrong or no longer applicable because of changes in organic law. Whatever may be the merit of Taxpayers' analysis in the abstract, *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937], mandates that this court follow our Supreme Court's lead.

Taxpayers contend also that section 1605.5, added to the Revenue and Taxation Code in 1967, changes the standard of judicial review of administrative determinations of county ad valorem taxes. That section, part of a comprehensive modification in the administrative procedure for assessing those taxes, provides for findings of fact by the board initially hearing the matter if requested by the taxpayer and states in part: "At the hearing the final determinations by the board shall be supported by the weight of the evidence." Taxpayers argue that the quoted language requires the reviewing court to exercise its independent judgment to determine the weight of the evidence before the board rather than to determine whether the board's action is supported by substantial evidence.

We construe Revenue and Taxation Code section 1605.5 as imposing a standard for action by the board but not as modifying the test of judicial review of the board's determination. The situation is analogous to the comparison between the standard of decision and the test of review in criminal proceedings. While guilt must be established beyond a reasonable doubt at trial, the test on appeal is whether substantial evidence sup-

ports the conviction. (*People v. Bynum*, 4 Cal.3d 589, 599 [94 Cal.Rptr. 241, 482 P.2d 1193].) The analogy emphasizes the significance of the statutory language that the determination shall be supported by the weight of the evidence "at the hearing." (*Westlake Farms, Inc. v. County of Kings*, 39 Cal.App.3d 179, 189 [114 Cal.Rptr. 137].)

Thus we conclude that the trial court properly applied the "substantial evidence test" in reviewing Board's determination, and that, having done so, it was not required to make independent findings of fact on issues before the Board. The issue on which Taxpayers claim they were denied a finding by the trial court—the county-wide ratio applied in assessing property generally—was one of those which the Board determined. (*Bank of America v. Mundo, supra*, 37 Cal.2d 1, 5.)

Excluded Evidence

At trial, Taxpayers offered evidence in the form of "admissions of members of the Board" that: (1) the ratio of assessed value to market value for all locally assessable property in the county was 25 percent; (2) neither the Board nor the county made any determination of county-wide ratio; (3) four of the five Board members were aware that the ratio in 1962 was about 25 percent but that the assessor had advised them that so long as it did not exceed 50 percent it was valid; and (4) the official State Board of Equalization findings of county-wide ratio did not become available until after the end of the County Board of Equalization session. Taxpayers also offered evidence of the county-wide ratio as determined by the state board for 1961 and as tentatively determined for 1962. The evidence was excluded by the trial court. That action was proper.

All items in the excluded evidence other than the last two pertain to the mental processes of the members of Board who decided adversely to Taxpayers. In *Web Service Co. v. County of Los Angeles*, 242 Cal. App.2d 1, 12, [51 Cal.Rptr. 753], we held that such evidence is inadmissible in judicial review of administrative proceedings. *Web Service* followed the persuasion of then existing federal authority, notably *United States v. Morgan*, 313 U.S. 409, 420-422 [85 L.Ed. 1429, 61 S.Ct. 999]. In 1971, the United States Supreme Court enunciated a significant exception to the *Morgan* Rule, holding that where the administrative agency did not make findings of fact or otherwise articulate a basis of its decision, the reviewing court could, in its discretion, require testimony from the administrative decision maker explaining the standard of decision used or alternatively remand the matter to the agency for findings of fact. (*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 [28 L.Ed.2d 136, 91 S.Ct. 814]; see also *Camp v. Pitts*, 411 U.S. 138, 142-143 [36 L.Ed.2d 106, 93 S.Ct. 1241]; see: *Recent Developments, Administrative Law and Procedure*, 60 Georgetown Law J. 1101, 1111; *The Supreme Court, 1970 Term*, 85 Harv.L.Rev. 3, 321; Note, *Environmental Law and the Scope of Judicial Review*, 24 Stan.L.Rev. 1117, 1118, fn.8.) If *Overton Park* is persuasive authority in California, it undercuts the footing of *Web Service Co.* Action by our Supreme Court subsequent to *Overton Park* indicates, however, that the decision has had no effect upon California law. In *State of California v. Superior Court* (*Veta Company*), 12 Cal.3d 237 [.... Cal.Rptr. ...., ... P.2d ....], a decision involving judicial review of an administrative determination unaccompanied by findings of fact, our Supreme Court cites and relies upon the rule of

Morgan without mention of *Overton Park. Overton Park* having been so treated by the California high court, we conclude that the rule of *Morgan,* and hence that of *Web Service Co.,* is applicable to the cases at bench. That rule supports the trial court's action barring testimony of the mental state of members of the Board in making their determination, including testimony of the standard of decision utilized.

The excluded evidence to the effect that the State Board of Equalization's determination of 1962 county-wide ratio of assessed to market value did not become available until after the equalization session of Board presents a different problem. Here the issue is the fairness of the administrative hearing and the possibility that evidence not available with reasonable diligence before the administrative agency may be produced on judicial review of the administrative decision.

Again precedent controls our decision. In *Glidden Company v. County of Alameda,* 5 Cal.App.3d 371 [85 Cal.Rptr. 88], the Court of Appeal states: ". . . [U]nless it is shown that the 'full cash value of all locally assessable tangible property' as computed by the state board is equal to the aggregate fair market value of the same property as appraised by the county assessor in the course of making his assessments, the difference between the assessment ratios is meaningless insofar as showing discrimination against this taxpayer is concerned." (5 Cal.App.3d at p. 381; see also *Griffith v. County of Los Angeles,* 267 Cal.App.2d 837 [73 Cal.Rptr. 773].) Here Taxpayers' offer of proof of the unavailability of the State Board of Equalization's determination of county-wide assessment ratio did not include an offer to establish that when the state determined ratio became available it was based upon a

similarity of total assessed values as determined by the state board and the Los Angeles County Assessor. The rule of *Glidden Company* thus supports the trial court's action in excluding the proffered evidence.

The same reasoning supports the trial court's exclusion of evidence of the county-wide ratio of assessment for 1961 as determined by the State Board of Equalization.

The trial court also excluded evidence offered by Taxpayers in the form of testimony of: (1) the Los Angeles County Assessor who assumed office in December of 1962 to the effect that his predecessor in office did not determine the county-wide ratio of assessed to market value of property, that in fact the county-wide ratio was 25 percent in 1962 while personal property such as that involved in the case at bench was assessed at 50 percent of its market value; (2) an assistant county counsel to the same effect; (3) of two deputy assessors to the effect that the assessor had made no determination of county-wide ratio in 1960 or 1962 and that the assessment of most buildings and other improvements on the assessment roll was not based upon appraisal, market value or cost in those years; (4) of the assessor to the effect that he admitted that there was no determination of total market value of all assessable property, there was no written direction or policy for the application of ratio, that he did not check on his deputies to determine their manner of assessment or application of an assessment ratio, and that there was no study made to determine whether a uniform ratio was being applied; and (5) of the clerk of the Board that it at no time in 1962 or prior years took any action to determine the actual county-wide ratio.

The record establishes no error in the trial court's ruling excluding that proffered evidence, since it supports the implied determination of the trial court that all of the excluded evidence could reasonably have been produced by Taxpayers at the hearing before the Board.

A taxpayer, questioning the correctness of assessed valuation, must fairly and fully present his showing to the Board as a prerequisite to a judicial attack upon the Board's determination. "Were the rule otherwise, the taxpayer could make a perfunctory showing before the board and reserve his real showing for a subsequent appeal to the courts. This is not permissible. . . ." (*Eastern-Columbia, Inc. v. County of L.A.*, 61 Cal. App.2d 734, 745-746 [143 P.2d 992].) That principle precludes the presentation before a reviewing court of evidence which with reasonable diligence could have been produced before the administrative agency but which was not there offered. Since the record in the case at bench fails to establish that Taxpayers, acting with due diligence, would not have been able to present to the Board the above evidence which they offered to the reviewing court, that court's action in excluding the evidence was proper.

Taxpayers attempted to make the necessary preliminary showing concerning the testimony of one witness offered by them. They proposed to prove by the former assistant executive secretary of the State Board of Equalization in charge of property taxation that the method used by the state board in determining county-wide ratios was a valid and accurate one and that the ratio so determined for Los Angeles County in 1962 was 24.6 percent. They established that there was at least some impediment to his testimony as a witness when

the matter was heard by the Board. The trial court nevertheless sustained an objection to the testimony. No error appears in that ruling.

The rule that evidence is not admissible at a trial testing the validity of a determination at an administrative hearing unless the party offering it could not with reasonable diligence have presented it at the administrative proceeding is not satisfied by a showing that a particular expert witness was not available. The party must, in addition, establish to the reasonable satisfaction of the trial court that the same expert testimony was not available from another witness. Here, Taxpayers not having made that showing, the trial court correctly barred the evidence offered by them.

Taxpayers alternatively seek to avoid the impact of the general principle barring the evidence offered by them at trial by arguing that much of the barred testimony was relevant to establish fraud on the part of the assessor and Board in making the questioned assessment and in administratively reviewing it. The argument is not available on the record here. Assuming the relevancy of the proffered testimony to the issue asserted, the evidence is not relevant to the case at bench because the issue of fraud was not raised in the complaint (Rev. & Tax. Code § 5139; *Davey v. Southern Pacific Co.*, 116 Cal. 325 [48 P. 117]) or in the protest.

Evidence offered ostensibly to support the proposition that a failure of equalization on the part of the assessor and Board estopped Board from asserting the requirement of exhaustion of administrative remedies was similarly properly excluded because no facts of estoppel were alleged in the complaint.

Evidence offered by Taxpayers on the issue of a claimed inadequacy of the processes of administrative review of the assessor's determination was properly barred because the claim was not asserted in Taxpayers' protests or alleged in their complaints.

Burden of Proof

Taxpayers contend that the trial court erred in concluding that they bore the burden of proving the impropriety of the assessments here involved. They argue that whatever may be the general rule of burden of persuasion, it does not apply where consistency of a particular assessment with county-wide ratio of assessment to market value is involved. Our Supreme Court has determined that "ratio of assessment" cases are to be treated in the same fashion as other contentions of excessive assessment. (*Dawson v. County of Los Angeles,* 15 Cal.2d 77, 79-81 [98 P.2d 495].) Similar treatment dictates that the taxpayer bears the burden of proof in ratio matters. (*Glidden Company v. County of Alameda, supra,* 5 Cal.App.3d 371, 382.)

Disposition

The judgments are affirmed.

CERTIFIED FOR PUBLICATION

Thompson, *J.*

We concur:

Lillie, *Acting P. J.*

Hanson, *J.*

APPENDIX B.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division One.

McDonnell Douglas Corp. (formerly Douglas Aircraft Company, Inc.), Plaintiff and Appellant, v. County of Los Angeles, City of Culver City, City of El Segundo, City of Los Angeles, and City of Santa Monica, Defendants and Respondents. Civil No. 38869, (Sup. Ct. No. 883022).

ITT General Controls Inc., a California corporation, Plaintiff and Appellant, v. County of Los Angeles, City of Glendale, and City of Burbank, Defendants and Respondents. Civil No. 38931, (Sup. Ct. No. 825959).

Filed: Sept. 26, 1974.

APPEALS from judgments of the Superior Court of Los Angeles County. Bayard Rhone, Judge. Affirmed.

Poindexter, Lynch & Buchanan, Poindexter & Doutré, William M. Poindexter, Louis Lieber, Jr., B. D. Freundlich, and Eberhard Schmoller, for Plaintiff and Appellant McDonnell Douglas Corp.

Poindexter, Lynch & Buchanan, Poindexter & Doutré, William M. Poindexter, John B. Marshall, and G. Donald Haarer, for Plaintiff and Appellant ITT General Controls Inc.

John D. Maharg and John H. Larson, County Counsel, A. R. Early, Assistant County Counsel, Douglas V. Hart and Dixon M. Holston, Deputy County Counsel, for Defendants and Respondents.

In these companion appeals to *Westinghouse Electric Company v. County of Los Angeles, etc.*, 2d Civil

No. 37809, ... Cal.App.3d .... [.... Cal.Rptr. ....], and *American Chemical Corporation v. County of Los Angeles etc.*, 2d Civil No. 38868, ... Cal.App.3d .... [.... Cal.Rptr. ....], both certified for publication and filed concurrently with this opinion, appellants raise essentially the same issues discussed in *Westinghouse Electric* and *American Chemical, supra.* To the extent that appellants' contentions here are identical with the contentions raised in those companion cases, those contentions must be rejected for the reasons there stated.

The two cases at bench, each of which claims an over-assessment of ad valorem taxes on property for the 1962 tax year, differ from *Westinghouse Electric* and *American Chemical.* In both cases here considered, the record before the Board of Equalization incorporates by reference proceedings for the same year in the matter of a reduction in assessment claimed by Leach Corporation pending before the board. In the Leach matter, the taxpayer claimed, as did appellants here, that its personal property had been assessed at 50 percent of its market value while other property in Los Angeles County was assessed at 25 percent of its value. Evidence before the board in Leach consisted of testimony of the assessor to the effect that all property was assessed at 50 percent of the assessor's opinion of fair market value. The board rejected Leach's proffered evidence of State Board of Equalization determinations of county-wide ratio of assessed to market value for prior years and declined to hold the matter under submission until the 1962 figures were available from the state board.

The difference between the record of the cases at bench and that in *American Chemical, supra,* is not

legally significant. Substantial evidence supports the determination of the County Board of Equalization that appellants' property was assessed equally with other property in the county within the principle discussed in *American Chemical.* Evidence of the state board ratios was inadmissible absent a foundational showing that the total value of locally assessable property in the county used by the state board was substantially the same as the total value arrived at by the county assessor. (*Glidden Company v. County of Alameda,* 5 Cal. App.3d 371, 380-381 [85 Cal.Rptr. 88].)

The judgments are affirmed.

CERTIFIED FOR PUBLICATION

Thompson, *J.*

We concur:

Lillie, *Acting P. J.*

Hanson, *J.*

APPENDIX C.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division One.

McDonnell Douglas Corp. (formerly Douglas Aircraft Company, Inc.), Plaintiff and Appellant, v. County of Los Angeles, City of Los Angeles, City of Culver City, City of El Segundo, and City of Santa Monica, Defendants and Respondents. Civil No. 38870, (Sup. Ct. No. 843563).

Filed: Sept. 26, 1974.

APPEAL from a judgment of the Superior Court of Los Angeles County. Bayard Rhone, Judge. Affirmed.

Poindexter, Lynch & Buchanan, Poindexter & Doutré, William M. Poindexter, Louis Lieber, Jr., B. D. Freundlich, and Eberhard Schmoller for Plaintiff and Appellant.

John D. Maharg and John H. Larson, County Counsel, A. R. Early, Assistant County Counsel, Douglas V. Hart and Dixon M. Holston, Deputy County Counsel, for Defendants and Respondents.

In this companion appeal to *Westinghouse Electric Company v. County of Los Angeles, etc.*, 2d Civil No. 37809, ... Cal.App.3d .... [.... Cal.Rptr. ....], and *American Chemical Corporation v. County of Los Angeles, etc.*, 2d Civil No. 38868, ... Cal.App.3d .... [.... Cal.Rptr. ....], both certified for publication and filed concurrently with this opinion, appellant raises essentially the same issues discussed in *Westinghouse Electric* and *American Chemical, supra.* To the extent that appellant's contentions here are identical with the contentions raised in those companion cases,

those contentions must be rejected for the reasons there stated.

The case at bench differs from *Westinghouse Electric* and *American Chemical* in three respects. Here appellant attempted to establish that its business personal property had been assessed at 50 percent of its fair cash value while other property in the county was assessed at the ratio of no more than 25 percent by evidence of four sales of real property which disclosed ratios of assessed to market value of 22.6 percent to 31.8 percent. Here appellant requested a continuance from the Board of Equalization so that it could produce State Board of Equalization computations of the county-wide ratio of assessment when those figures became available. Finally, in this case the record of proceedings before the Board of Equalization indicates that two of its members applied an erroneous standard of decision.

These differences do not distinguish the case at bench from *Westinghouse Electric* and *American Chemical.* Appellant bore the burden of proving to the board that the assessment of its property was incorrect. (*Griffith v. County of Los Angeles,* 267 Cal.App.2d 837, 842 [73 Cal.Rptr. 773], cert. den. 395 U.S. 945; *Glidden Company v. County of Alameda,* 5 Cal.App. 3d 371, 382 [85 Cal.Rptr. 88].) The insignificant sample of four sales of real property presented by appellant to carry its burden was insufficient for that purpose. (*Schwarz v. County of Marin,* 271 Cal.App. 2d 120, 123 [76 Cal.Rptr. 207].) Appellant has not shown prejudice from the denial of the continuance to enable it to produce the State Board of Equalization computations. No contention was made that the state board figures when available would be computed on the same aggregate fair market value of all taxable prop-

erty in the county as was used by the assessor. (*Glidden Company v. County of Alameda, supra,* 5 Cal. App.3d 371, 381.) While the Board of Equalization may have applied an improper standard of decision, appellant was not prejudiced because its factual showing before the board was inadequate as a matter of law to sustain a reduction of assessment. (*Schwarz v. County of Marin, supra,* 271 Cal.App.2d 120, 123.)

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

Thompson, *J.*

We concur:

Lillie, *Acting P. J.*

Hanson, *J.*

APPENDIX D.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division One.

Westinghouse Electric Corporation, a corporation, Plaintiff and Appellant, v. County of Los Angeles, City of Los Angeles, City of Vernon, City of Commerce, City of Compton, City of Montebello, City of Alhambra, City of Arcadia, City of Hawthorne, City of Huntington Park, City of Palmdale, City of Maywood, City of West Covina, City of Pomona, City of Bell, and City of Santa Monica, Defendants and Respondents. Civil No. 39091, (Sup.Ct.No. 840485).

Shell Oil Company, Plaintiff and Appellant, v. County of Los Angeles, City of Los Angeles, City of Culver City, City of Lynwood, City of Signal Hill, and City of Torrance, Defendants and Respondents. Civil No. 39092, (Sup.Ct.No. 814368).

Filed: Sept. 26, 1974.

APPEALS from judgments of the Superior Court of Los Angeles County. Stevens Fargo, Judge. Affirmed.

Poindexter, Lynch & Buchanan, Poindexter & Doutré, William M. Poindexter, and Edward Stevens for Plaintiffs and Appellants.

John D. Maharg and John H. Larson, County Counsel, A. R. Early, Assistant County Counsel, Douglas V. Hart and Dixon M. Holston, Deputy County Counsel, for Defendants and Respondents.

In these companion appeals to *Westinghouse Electric Company v. County of Los Angeles, etc.*, 2d Civil No. 37809, ... Cal.App.3d .... [.... Cal.Rptr. ....], and *American Chemical Corporation v. County of Los Angeles, etc.*, 2d Civil No. 38868, ... Cal.App.3d .... [.... Cal.Rptr. ....], both certified for publication and filed concurrently with this opinion, appellants raise essentially the same issues discussed in *Westinghouse Electric* and *American Chemical, supra.* To the extent that appellants' contentions here are identical with the contentions raised in those companion cases, those contentions must be rejected for the reasons there stated.

The cases at bench differ from *Westinghouse Electric* and *American Chemical* in that here the record of proceedings before the Board of Equalization indicates that at least two of its members applied an improper basis of decision. Appellants, however, were not prejudiced by that action. They bore the burden of proof of establishing an improper assessment before the board. (*Griffith v. County of Los Angeles,* 267 Cal.App.2d 837, 842 [73 Cal.Rptr. 773], cert. den. 395 U.S. 945; *Glidden Company v. County of Alameda,* 5 Cal. App.3d 371, 382 [85 Cal.Rptr. 88].) To sustain that burden, they offered only evidence that the State Board of Equalization's determination of county-wide ratio of assessed to market value was 25 percent while their properties had been assessed at 50 percent of full cash value. Appellants did not offer evidence that the state board ratio was computed using the same aggregate fair market value of all taxable property in the county as was used by the assessor. Absent that showing, the state board's ratio was inadmissible. (*Glidden Company v. County of Alameda, supra,* 5 Cal.App.3d 371.

380-381.) Thus appellants failed, as a matter of law, to sustain their burden of proof, compelling a conclusion that their properties were correctly assessed.

The judgments are affirmed.

CERTIFIED FOR PUBLICATION.

Thompson, *J.*

We concur:

Lillie, *Acting P. J.*

Hanson, *J.*

APPENDIX E.

§1605. *Individual assessments; reducing or increasing*

"After giving notice as prescribed by its rules, the county board may increase or lower any assessment on the local roll in order to equalize the assessment of property on the local roll."

§1605.1 *Construction of section 1605*

Nothing in Section 1605 of this code shall be construed as permitting any violation of Section 408 or Section 451 of this code.

The county board shall neither raise nor lower the entire local roll.

§1606. *Entire roll not to be raised or lowered*

The county board shall neither raise nor lower the entire local roll.

§1607. *Application for reduction*

(a) A reduction in an assessment on the local roll shall not be made unless the party affected or his agent makes and files with the county board a verified, written application for plaintiff showing the facts claimed to require the reduction.

(b) Except as provided in Section 1706, the application shall be filed between July 2 and August 26.

§1608. *Application for reduction; examination of applicant*

Before the county board makes any reduction, it shall examine, on oath, the person affected or the agent making the application touching the value of the property. A reduction shall not be made unless the person or agent attends and answers all questions pertinent to the inquiry.

§408. *Non-statutory information; privacy; inspection by assessee; market data*

(a) Except as otherwise provided in subdivisions (b) and (c) any information and records in the assessor's office which are not required by law to be kept or prepared by the assessor are not public documents and shall not be open to public inspection.

(b) The assessor may provide any appraisal data in his possession to the assessor of any county and shall provide any market data in his possession to an assessee of property or his designated representative upon request. The assessor shall permit an assessee of property or his designated representative to inspect at the assessor's office any information and records, whether or not required to be kept or prepared by the assessor, relating to the appraisal and the assessment of his property. An assessee or his designated representative, however, shall not be provided or permitted to inspect information and records, other than market data, which also relate to the property or business affairs of another person, unless such disclosure is ordered by a competent court in a proceeding initiated by a taxpayer seeking to challenge the legality of his assessment.

(c) The assessor shall disclose information, furnish abstracts or permit access to all records in his office to law enforcement agencies, the county grand jury, the board of supervisors or their duly authorized agents, employees or representatives when conducting an investigation of the assessor's office pursuant to Section 25303 of the Government Code, the State Board of Equalization and other duly authorized legislative or administrative bodies of the state pursuant to their authorization to examine such records.

(d) For purposes of this section, "market data" means any information in the assessor's possession, whether or not required to be prepared or kept by him, relating to the sale of any property comparable to the property of the assessee, if the assessor bases his assessment of the assessee's property, in whole or in part, on such comparable sale or sales. The assessor shall provide the names of the seller and buyer of each property on which the comparison is based, the location of such property, the date of the sale, and the consideration paid for the property, whether paid in money or otherwise, but for purposes of providing such market data, the assessor shall not display any document relating to the business affairs or property of another.

§5103. *Actions; parties; statute of limitations; jurisdiction; joinder; defense counsel*

If the board of supervisors rejects a claim for refund in whole or in part, the person who paid the taxes, his guardian, executor, or administrator may within six months after such rejection commence an action in the superior court against the county or a city to recover the taxes which the board of supervisors or the city council have refused to refund.

If all or any portion of the taxes sought to be recovered were collected by officers of the county for a city, an action must be brought against the city for the recovery of such taxes and judgment must be sought against the city. Where actions are brought against both a county and a city such actions may be joined in one complaint.

Any city for which county officers collect taxes may provide for the defense by counsel for the county of

actions brought against the city under this article, in which event it shall be the duty of such counsel to defend such actions, or the city may provide that such actions shall be defended by its own counsel.

§5104. *Actions; necessity of claim*

No action shall be commenced or maintained under this article unless a claim for refund shall have been filed in compliance with the provisions of this article, and no recovery of taxes shall be allowed in any such action upon a ground not asserted in the claim for refund.

§5136. *Payment under protest; right; nature*

After taxes are payable, any property owner may pay the taxes on his property under protest. A payment under protest is not a voluntary payment.

§5137. *Protest; contents*

The protest shall be in writing, specifying:

(a) Whether the whole assessment is claimed to be void or, if only a part, what portion.

(b) The grounds on which the claim is founded.

§5137.5 *Protest; numbering; marking on roll*

The written protest shall be numbered by the tax collector and filed in his office and the fact of such protest and the number thereof shall be marked on the roll or delinquent roll, opposite the tax to which the payment relates.

§5138. *Action; right; limitation; parties; jurisdiction; joinder; defense counsel*

Within six months after the payment, an action may be brought against a county or a city in the superior court to recover the taxes paid under protest.

If all or any portion of the taxes paid under protest and sought to be recovered were collected by officers of the county for a city, an action must be brought against the city for the recovery of such taxes and judgment must be sought against the city. Where actions are brought against both a county and a city such actions may be joined in one complaint.

Any city for which county officers collect taxes may provide for the defense by counsel for the county of actions brought against the city under this article, in which event it shall be the duty of such counsel to defend such actions, or the city may provide that such actions shall be defended by its own counsel.